THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT GULU

CRIMINAL MISCELLANEOUS APPLICATION NO. 26 OF 2022

(ARISING FROM CRIMINAL CASE NO. 99 OF 2021, CRB 1493/2021)

OPIYO CHARLES *alias* SMALL..... APPLICANT

VERSUS

UGANDA.....RESPONDENT

BEFORE: HON. MR. JUSTICE GEORGE OKELLO

RULING

The Applicant who is the accused number 3 in criminal case No. 99 of 2021, emanating from CRB 1493 of 2021, stands indicted for aggravated robbery, contrary to sections 285 and 286 (2) of the Penal Code Act, Cap. 120. He is charged with four other persons. He lodged the present application for bail, by way of Notice of Motion, supported by his affidavit. His co-accused are named as applicants. I have concluded, they were named in error, having not lodged affidavits in support, and having not prosecuted this application. The Application is omnibus and not tenable under the law governing bail. Each Applicant for bail ought to file separate application, stating reasons peculiar to him/her. See: Katebarirwe Alfred & Komunda Ephraim Vs. Uganda, Criminal Application No. 165 of 2019 (Court of Appeal), Kakuru, JA. I have however noted that the order sought

in the Motion is specific to the applicant (A3) and not the co accused persons. Therefore, rather than strike out the application for being defective, I have decided to entertain it, but omitted the names of the other co-accused from this ruling, in the interest of doing substantive justice in the matter. I find comfort in Article 126 (2) (e) of the Constitution of Uganda, 1995, by disregarding the anomaly as a mere technicality. See: Utex Industries Ltd Vs. AG, SCCA No. 52/1995. However, advocates are advised to be more scrupulous when drawing pleadings and conducting business in court.

Turning to the application, the Applicant (A3) seeks to be released on bail, pending trial by this court, and prays for costs of the application. The Application is grounded on Article 28 (3) (a) of the Constitution of Uganda, 1995, sections 14 (1), 15 (1) and (3) of the Trial on Indictments Act, Cap 23, and Rules 2 and 4 of the Judicature (Criminal Procedure) (Application) Rules, S.1 13-8.

The grounds of the Application are, in summary, that, the applicant is presumed innocent until proven guilty, and has a constitutional right to apply for bail; that, there is a high likelihood of substantial delay in the trial and determination of the criminal case against the applicant; that he has substantial sureties, ready to ensure he does not abscond; that, the applicant's case has a high probability of success, and is not frivolous; the

applicant is ready to abide by the bail terms and conditions, if released; that, he has no negative antecedents after his arrest, committal, and remand, pending trial; that, his incarceration has and continues to affect the welfare of his family; and that, it is in the interest of justice that he is granted bail.

In his detailed affidavit, the applicant amplifies the above grounds. He however canvasses one additional ground of ill-health, *albeit* having not pleaded, deposing that, he suffers from hypertension and diabetes and requires proper medical treatment unavailable in Gulu prison sick bay, and so the prison condition is not favourable to his health condition, as advised by a personal doctor. That, in 2017, the applicant was charged with murder, released on bail, whose conditions he duly complied with, until the charge was dropped by the Director of Public Prosecutions (DPP). He deposed that he is a driver and a peasant farmer, and was arrested on 13 December, 2021, charged with aggravated robbery, a bailable offence. He was remanded to Pece Prison in Gulu City but later transferred to Gulu Main Prison, and was committed to the High Court on 19 July, 2022 for trial. I have decided not to repeat the other amplification of the grounds, to achieve brevity, but all depositions have been taken into account, in my final analysis and decision.

The application is opposed by the Respondent, on whose behalf a one No. 60034 D/C Lakareber Lydia, an investigating officer in the matter, deposed an affidavit. The premise of the opposition, in summary, are that; the offence with which the applicant is charged is very serious and attract a maximum sentence of death on conviction; and because of the foregoing, the applicant is more likely to abscond, if released on bail; the offence was committed in a violent manner, as it involved abduction of the victim from his home, threats to the victim's life with a knife; the applicant will interfere with prosecution witnesses due to his violent disposition; and will commit more crimes if granted bail; there is lack of proof of grave illness incapable of being treated whilst the applicant is on prison remand; the sureties are not substantial, having not shown any assets capable of attachment and have not proved that they are capable of forfeiting the bond, if the applicant were to abscond once released; the need for court to balance the rights of the applicant and the need to protect society from lawlessness; the need to balance the presumption of innocence with public interest; the applicant has already been committed for trial and the High Court may try him at any convenient time; it is in the interest of justice that the bail is denied and the criminal case be fixed for hearing in the next convenient High Court criminal session.

Representation

The Applicant was represented by learned counsel Doughlas Odyek, while Ms. Grace Nyipir, a State Attorney in the Office of the DPP, appeared for the Respondent. The Applicant lodged written submissions at the time of filing the application, prompting court to direct the Respondent to file written submission.

Submissions

In his submissions, Mr. Odyek contended that his client has had his liberty deprived before trial, and since he is not serving any sentence, has a right to apply for bail. He cited Article 23 (6) (a) of the Constitution of Uganda, 1995. He pressed that the applicant has been on remand for eight months without trial, and on that basis, seeks to be released on bail. He submitted that the applicant was arrested on 13 December, 2021 from Layibi Centre A/B, Tegwana Ward, Pece-Laroo Division, Gulu City, and arraigned in court, together with three others, and others still at large, charged with the offence of aggravated robbery, and has now been remanded in prison, pending trial.

Learned counsel also submitted that the application was also premised on Article 23 (6) (b) of the Constitution of Uganda, 1995, which I found erroneous, on the facts, as the Motion does not indicate so, and given that the provision deals with mandatory bail, in offences triable by both the

Magistrates Court and the High Court, where an accused has been remanded in custody for sixty days before trial. The offence for which the applicant is indicted is not triable by the Magistrate Court. I rest my comments on this limb of the submission. Learned counsel also cited section 14 (1) of the Trial on Indictment Act (TIA) and argued that, the High Court may grant bail at any stage in the proceedings. Whereas I agree with counsel, as this is how the law is worded, I hasten to clarify that bail cannot be granted after conviction, and yet that would be a stage in the criminal proceedings. So, the section ought to be interpreted in a proper context. Learned Counsel submitted that the conditions to be considered for bail are set out in section 15 of the TIA, being, exceptional circumstances, and that the accused will not abscond. Without expounding on what 'exceptional circumstances' are, learned counsel cited the constitutional court decision of Foundation for Human Rights Initiative Vs. Attorney General, Constitutional Reference No. 08 of 2005, and argued that, it is no longer mandatory for court to consider exceptional circumstances, but should exercise discretion, making sure the accused will not abscond. I agree, but in a bail application involving serious offences, court may not always ignore exceptional circumstances, but may take it into account, alongside other factors.

Mr. Odyek then argued that, having a fixed place of abode within court's jurisdiction and substantial sureties, is consistent with the view that an

accused will not abscond. He drew a nexus between the foregoing and considerations such as whether an accused has a history of breaching bail terms and whether there are other pending criminal cases against him, and urged court to release his client on bail.

Learned counsel for the applicant invited court to consider the fact of presumption of innocence, enshrined in article 28 (3) (a) of the Constitution, in his client's favour. He urged court not to act on mere allegation, fears, suspicions, as the sky would be the limit and one would envisage no occasion when bail would ever be granted, if court considered such allegations. He relied on Kanyamunyu Mathew Muyogoma Vs. Uganda, Criminal Application No. 0177/2017. Learned counsel also cited Abindi Ronald & another Vs. Uganda, Misc. Crim. Application No. 020 of 2020, and argued that the applicant should not be incarcerated if he has a fixed place of abode, and sound sureties. He concluded on these grounds that the applicant satisfied the conditions. Learned counsel wound his submission by addressing the issue of ill-health of the applicant, contending that the applicant was advised by the prison medical Doctor to get medication from better medical facilities. He argued, health is a priority, and since the applicant's condition is not improving, he ought to be granted bail, to access better Medicare outside prison. Counsel submitted that the medical forms were attached to the submission. This was not true and if it were so, it would be erroneous because submission

is not an affidavit to which documents for use in evidence should be annexed. Learned Counsel then invited court to also consider the applicant's family role as a breadwinner, with a spouse, three children and an elderly mother to take care of.

In her rival submissions, Ms. Nyipir, the learned State Attorney started her opposition by submitting that whereas the applicant has a constitutional right to apply for bail, yet grant of bail is not automatic but discretionary. She relied on the Constitutional Reference No.20 of 2005: Uganda (DPP) Vs. Col. (RTD) DR. Kiiza Besigye. Citing sections 14 and 15 of the TIA, the learned State Attorney outlined conditions that court may consider in bail applications, namely, the risk of the accused absconding and interference with the due course of justice; gravity of the offence; status of the offence and stage in the proceedings; the likelihood of the accused offending while on bail; the exceptional circumstances of- grave illness certified by the prison medical officer as incapable of being treated at the prison health facility, the infancy or advanced age of the applicant, a certificate of no objection issued by the Director of Public Prosecutions (DPP).

The learned State Attorney argued that the applicant (and others) are indicted of aggravated robbery of Ugx 60,000,000 (Sixty Million Shillings.) from the complainant, and it involved gross violence. That, the offence was an organized one, with the applicant being the planner. That, he and others masqueraded as policemen, went to the victim's home, armed with

handcuffs, while wearing police cap, abducted the victim, put him on a motorcycle and rode away, taking him to a Lagoon within Gulu City. That, whilst at the Lagoon, the hands of the victim were tied, a knife was pointed at the victim, with threats to kill him. That, keys for a shop and store of the victim's father were forcefully removed from the victim, and he was left tied at the Lagoon, as some of the accused persons went to the shop/store, which they opened, and took away/ stole Ugx 60,000,000.

Drawing inference from the foregoing submissions, the State counsel contended that, the applicant is more likely to commit more offences, if released on bail. Relying on the Constitutional reference No. 20 of 2005: Uganda (DPP) Vs. Col (RTD.) Dr. Kiiza Besigye (*supra*), Ms. Nyipir submitted that court ought to balance the constitutional right of the applicant and the need to protect society from lawlessness. Relying on the applicant's own deposition and submission, the State counsel argued that the applicant is a habitual criminal who has been in prison on murder charge, and if released on bail, would interfere with key prosecution witnesses, who are vulnerable, and are known to the applicant. That, the applicant is likely to commit offences again. It was argued that, having been committed to trial, the prosecution is ready to adduce evidence against the applicant. On the applicant's contention that he suffers from ill-health, the State counsel contended that there is no proof, by way of certified medical report from prison medical facility, and that, in any case,

it is not shown that the same would not be capable of being managed there. The State counsel went overboard, submitting on matters of general health of other prisoners, not borne out of evidence, and in court's view, extraneous. Closing her arguments, the State counsel disagreed that the sureties are substantial. She argued that no evidence was adduced to show that they have assets worth attaching, to fulfill the bond, or assets that the sureties could forfeit, if the applicant were to be released, only to abscond. She cited Agangyira Albert Vs. Uganda, HCCA No. 071 of 2013. On sureties, it was argued, they were brother and sister in law to the applicant, and on whom the applicant has influence, and not the other way round. So, it was contended, the sureties will not compel the applicant to attend trial. To the State counsel, the applicant's domestic responsibility is no basis for seeking bail. That, considering the circumstances, the justice of the matter dictates the denial of bail.

Determination

Court has duly considered both submissions. Court notes that although several court decisions were cited by both officers of court, the officers were not courteous enough to furnish copies to court. Officers of Court should always ensure that whatever authorities are cited, are availed to court, to aid court in discharging its judicial duties. Court has nevertheless accessed the authorities, on its own, considered them, as well as those not

cited, in arriving at its decision. The shortfall notwithstanding, Court remains grateful to both learned counsel for their detailed address.

Bail, as I understand it, is an agreement or recognizance between the accused (and his sureties, if any), and the court, that the accused will pay a certain sum of money fixed by the court should he/she fail to appear to attend his/her trial on a certain date.

See: B.J Odoki: A guide to criminal procedure in Uganda (2nd Ed.) 1990., at P. 71; Francis J. Ayume, Criminal Procedure and Practice in Uganda, p. 54; Aganyira Albert Vs. Uganda, Criminal Misc. Application No 0071 of 2013 (Lady Justice Alividza, J.)

The object of bail is to ensure that the accused person appears to answer the charge against him/her, without being detained in prison on remand pending trial. The effect of bail therefore is to temporarily release the accused person from custody.

The law on bail is fairly well settled. I begin by summarizing the principles governing pretrial bail. Court notes that although court is dealing with bail in the High Court in a matter of a capital nature, some of the principles enunciated herein do apply to bail in the Magistrates Courts with equal force. I therefore take no trouble in distinguishing those principles which

do not apply to the Magistrate courts, from those applicable. Thus the principles outlined herein ought to be applied in a proper context. The principles are;

a) An accused person has a right to apply for bail, and section 15 of the Trial on Indictments Act does not take away an accused person's right to apply for it. See: Article 23 (6) (a) of the Constitution; Foundation for Human Rights Initiative (hereafter, FHRI) Vs. Attorney General, Constitutional Appeal No. 03 of 2009 (SCU)

b) Bail is meant to protect and guarantee the fundamental rights of the individual to liberty, the presumption of innocence, and the due process of the law on the one hand, and the societal interests on the other. See: Articles 23 (1) (c), 28 (3) (a), 126 (1) of the Constitution and FHRI VS. AG (SCU) Katureebe, CJ.

c) Court is supposed to balance between the competing rights and interests of an accused with the needs and interests of society at large, to prevent and punish crimes committed within its midst. This is because judicial power is derived from the people and must be exercised by the courts in the name of the people and in conformity with the law and with the values, norms and aspirations of the people. See Article 126 (1) of the Constitution. So people are

important and are major beneficiaries of the criminal (and civil) justice system.

d) The most important consideration for grant of bail is whether the accused will turn up for his trial and will not interfere in any way with evidence.

e) Court may, in an appropriate case, consider the immediate interests of the accused even particularly with regard to his personal security, particularly in grave offences like rape, murder, child kidnap, aggravated robbery, aggravated defilement, etc. where there may be a real danger to the accused person from members of the public where the offence is committed. See: FHRI Vs. AG; Abindi Ronald & another Vs. Uganda, Misc. Criminal Application No. 020 of 2016.

f) Court exercises discretion whether to grant or not to grant bail, and the discretion has to be exercised judiciously. See Article 23 (6) (a) of the Constitution; Uganda Vs. Col. (RTD) Dr. Kiiza Besigye, Constitutional Reference No. 20 of 2005.

g) When a person has been on remand for the periods stipulated in Articles 23 (6) (b) and (c) of the Constitution (providing for remand of 60 days without trial in a matter triable both by the Magistrates Court and the High Court, and 180 days without committal in a matter triable only by the High Court), the court has no discretion

whether or not to grant bail. Court must grant bail but still exercises discretion in setting the bail terms and conditions. See: FHRI Vs. AG (SCU).

h) There is a need to prove exceptional circumstances to the satisfaction of court, that, they exist, justifying release on bail, and that the accused will not abscond. Court can then consider whether or not to consider these exceptional circumstances, given the circumstances of the case. The exceptional circumstances are;

i) Grave medical illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of offering adequate medical treatment while the accused is in custody.

ii) A certificate of no objection by the Director of Public Prosecutions.

iii) The infancy or advanced age of the accused.

See: Section 15 (1) (a) and (b), and section 15 (3) of the Trial on Indictment Act, Cap 23.

iv) Court may not restrict itself to only the three exceptional circumstances listed in section 15 (3) of the TIA but may

consider other 'exceptional circumstances' which might exist, in the given circumstances. See FHRI Vs. AG (SCU).

v) The requirement to prove exceptional circumstances listed in section 15 (3) of the TIA are therefore merely directory. The provision merely offers guidance to court and not direction. The High Court still retains discretion to either grant or not to grant bail even where the exceptional circumstances are not proved in respect of the offences listed in section 15 (2) of the TIA.

vi) Court may take into account the following factors, in considering whether or not the accused is likely to abscond;

a) Whether the accused has a fixed place of abode within the court's jurisdiction or is ordinarily resident outside Uganda;

b) Whether the accused has sound sureties within the jurisdiction, to undertake that the accused shall comply with the conditions of his or her bail;

c) Whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and

d) Whether there are other charges pending against the accused.

Whereas the above factors are permissive, in court's view, they seem all relevant, when court is determining whether or not an accused person is likely to abscond.

The requirement to prove exceptional circumstances and that the accused will not abscond are therefore not mandatory, though justified. This is because courts have duty to protect society from lawlessness and must therefore guard against absconding and the danger of interfering with the witnesses or evidence.

J. Requiring an accused person charged with serious offences to prove exceptional circumstances before court can exercise its discretion as to whether to grant or not to grant bail, is not unconstitutional and does not contravene either Article 23 (6) or 28 of the Constitution. Court retains discretion whether or not to overlook the exceptional circumstances, but the discretion must be exercised judiciously.

K. Once the court decides to grant bail, it should be on such terms as the court considers reasonable. Reasonableness requires that

the court weighs all relevant factors before granting bail to an accused.

I have carefully considered all the material placed before me in this matter. Several arguments have been canvassed for and against the grant of bail by learned counsel for both parties. I must point out that in a bail application, court is not enjoined to accord decisive weight to the one or the other or all the factors mentioned. This court retains the discretion to decide whether and to what extent any one or more such pros and cons are found to exist and what weight each should be afforded. The factors argued are only a guide. I begin with applying the elimination method to deal with those factors which are irrelevant in a bail application. Thereafter, court shall address factors it considers relevant, for the purpose of the application.

Learned counsel for the Applicant's arguments with respect to applicant's responsibility as a family man is appreciated, but is no basis for grant of bail. In Henry Bamutura Vs. Uganda, Misc. Application No. 19 of 2019 (SCU), Hon Lady Justice Prof. Tibatemwa- Ekirikubinza, JSC, stated that hardship, if any, facing an applicant's family, are no exceptional (and unusual) factors for consideration in bail application. See also Dominia Karanja Vs. Republic (1986) KLR 612.

I next consider the submissions made in respect of the applicant's character. It was argued for the applicant that he is a law abiding citizen and ought to be granted liberty pending trial. However, on the other hand, learned counsel volunteered that, in 2017, the applicant was charged with murder, released on bail, he complied with the bail terms, and never absconded. In the Notice of Motion, it is averred that the applicant does not have negative antecedents. The averment is qualified (inadvertently) that, the positive antecedents are those after the arrest and committal of the applicant to the High Court. In paragraph 9 of his affidavit, the applicant admits that he was, in 2017, charged with the offence of murder and got bail, and that afterwards, the DPP withdrew the charges. This, the Respondent did not rebut. However, whereas the applicant is presumed innocent, and with no criminal record since he was not convicted for the alleged murder, court holds that good record per se is no ground for grant of bail by this court. In the case of Henry Bamutura case (*supra*), the Hon. Lady Justice of the apex court observed "good character can never be enough because there is nothing exceptional or unusual in having good character." The Court cited with approval, Somo Vs. Republic [1972] E.A 478-481. In the present matter, I find that the good character of the applicant, whether qualified or not, is irrelevant.

Relatedly, it was argued for the Respondent that the applicant's character is tainted, having been charged with murder in the past, and he is likely

to interfere with witnesses. I find this argument unsupported, because, the State did not adduce evidence to show that, whilst on bail on the murder charge, the applicant interfered with prosecution witnesses. However, by the applicant's own concession, the murder charge occurred in 2017, and the current offence he is charged with is robbery, alleged to have been committed in December 2021, a span of about four years from the last allegation of murder. Whereas the applicant could have been of good disposition then, and did not interfere with the prosecution witnesses at the time, in the present matter, the alleged offence is said to involve violence and persons who are well known to the applicant. It is alleged in the committal papers, especially the summary of the case (annexed to the affidavits of both parties) that the victim of the robbery is a brother to one of the accused persons, and that, on the fateful day of the alleged robbery, two of the accused persons went to the home of the applicant, where the robbery was planned. That, the applicant informed his co accused (a brother of the victim and a son of the complainant) that the applicant had been reliably informed that the complainant had a lot of money at his shop/store. That, the Applicant and his co-accused (alleged conspirators) devised plans of robbing the shop of the father of the 2nd accused. The summary gives further details, which are not necessary at this point. But suffice is to state that, the narrative given by the Respondent, *prima facie*, supports the allegations that the applicant is known to the victim and the complainant. Therefore, there is a very high likelihood that if released on

bail, more so, after his recent committal to the High court, vide the committal paper dated 19 July, 2022, the possibility of intimidating the witnesses for the prosecution some of whom are alleged to be known to the Applicant, cannot be ruled out. The applicant did not rebut the deposition of the Respondent that he is of a violent disposition. He did not file an affidavit in reply, even when given the chance by court during the appearance of 14 September, 2022 for bail hearing. During my last perusal of this ruling before the delivery time, the clerk of this court brought to court's attention the fact that, after the last appearance of 20th September, 2022, the Applicant's counsel filed a rejoinder affidavit on 21 September, 2022 at about 4:PM in Court. Naturally, the same is not shown as having been served on the Respondent, and it was not filed with leave of court. It was lodged late after the submissions were closed and after the learned counsel had informed court that, his client would not lodge a rejoinder affidavit. In this affidavit, which I have considered, albeit the procedural flaws, the applicant merely asserts that he is not violent. It is his words against that of the State. The Police Officer who swore an affidavit, deposing about the applicant's violent character has not been cross examined. As an investigating officer, who investigated the alleged robbery, she is competent to speak about the disposition of the applicant and his co accused. I believe her. It is not shown that she lied about the accused or that she would have reason for doing so. Having been committed to trial, the applicant is presumed to know the detailed allegations against him,

and possible witnesses, and exhibits. The possibility of interfering with witnesses and evidence is not remote. I note the State allegation that the proceeds of the robbery was used to purchase some property. It is not improbable for the alleged proceeds of robbery to be interfered with, making a possibility of compensation orders, if a court were to convict the accused persons, and order compensation, impossible of being achieved. Right now, all the accused persons are presumed innocent, but again, court cannot open flood gate for interference with the due process of the law. Otherwise the criminal justice system will be a mere mockery. The Applicant did not cast doubt in the State deposition on these critical concerns. The same are not mere fears or suspicion, as learned counsel for the applicant submitted. Submission without evidence, with respect, is not helpful, as regards these factual matters. I therefore accept the State evidence that the applicant is likely to interfere with the prosecution evidence and witnesses, if released on bail. In Attorney General Vs. Joseph Tumushabe, Constitutional Appeal No. 03 of 2005, Mulenga, JSC stated thus "in the case of a person accused of a criminal offence applying for release on bail pending trial, the court's principal consideration is whether such release is likely to prejudice the pending hearing." I hold that there is credible evidence that, if released, the applicant will interfere with the witnesses for the prosecution, some of whom are known to him.

This ground alone would dispose of the application.

However, court shall proceed to consider other relevant grounds and arguments canvassed by the parties. Arguments were canvassed touching on only one exceptional circumstance, namely, ill-health of the applicant. It was deposed and argued that he suffers from hypertension and diabetes. No medical proof was attached. Court notes that, during the proceedings of 20.09. 2022 (examination of sureties), learned counsel for the applicant, half-heartedly intimated to court that he wanted to apply to tender in medical evidence. Learned counsel stated that the medical report and documents were prepared by the applicant's private Doctor, and were due for certification by the Prison Doctor. This revelation was rather surprising, as such evidence would not come within the four corners of the medical report envisaged under section 15 (3) (a) of the TIA. Even when court disregarded the State objection, and asked to peruse the alleged medical report, learned counsel confessed that he did not have it in court, and altogether abandoned the belated attempt to seek leave to rely on the same. Court was taken aback on the day of delivering this ruling on 22 September, 2022, when court's attention was drawn to a belated affidavit mentioned already herein, wherein the applicant attaches medical documents. I perused them and decided to consider them, despite the fact that they were not brought to the attention of the State. The documents attached were issued variously during the years 2016 to 2018 by St. Mary's hospital, Lacor. There is no medical document issued by the Prison health facility where the applicant has been in custody on remand since

December 2021, showing that whilst there, he has been sick. Curiously, there is no medical report showing that the Prison facility is not capable of treating the applicant, of hypertension and diabetes. It is not shown that arrangements are not possible to have him accessed by his personal doctors, if any. I have not seen any report by a personal doctor either. Thus, I have given no weight to the medical report from St. Mary's Hospital Lacor. This ground is not proved.

However, court is of the view that, whereas the need to prove grave illness is not mandatory in all cases of bail in this court, on the facts of the case, the applicant is indicted for a grave offence, which carries a possible death sentence, if convicted. Therefore, court holds that, the applicant ought to have proved this exceptional ground, if court were to consider whether or not to exercise its discretion in his favour. This, as is clear to all concerned, has not been proved. It seems to court that, the applicant's deposition about ill-health is an afterthought, otherwise, the same would have been pleaded in the Notice of Motion lodged on 6 September 2022. It is curious to note that the Applicant signed his affidavit before a Justice of Peace on 30 August 2022, six days before the Motion was filed in Court, so court wonders why the motion (signed by counsel on 6 September, 2022) could not bear the ground of ill-health and the alleged medical report from Prison. The applicant and counsel had all the time to put their house in order, but did not. Court does not act for the parties. I find that, because

of the grave nature of the accusation, exceptional circumstances are material, and ought to have been proved, which the applicant has failed to prove just one of.

Court was addressed on the aspect of sureties. It was argued for the applicant that the two sureties, namely, Okumu Michael, aged 51, a brother in law of the applicant (married to the applicant's sister), and a business man; and Ms. Joyce Ajok, 48-year-old, a teacher by profession in Kamguru Primary School, Nwoya District, and a sister to the applicant, are substantial sureties. The State argued, the sureties are not substantial. I will not reproduce those arguments again. Court notes that the Local Council 1 Chairperson who is said to have written the letters for the sureties (and the applicant) erroneously claimed that the sureties are to stand for the applicant in a case of theft (not aggravated robbery). It also seems to court that, the sureties do not appreciate the nature and the gravity of the offence with which the applicant (and others) have been indicted and committed to court for trial. Although they said they appreciate their duties, it is not shown that they have influence over the applicant. Mr. Okumu is married to the sister of the Applicant. However, the fact of being a brother in law, is no basis for the State to surmise that the relationship would compromise the duty of this surety. That suggestion is extraordinary though attractive. I reject it. However, why I find the sureties not substantial is because they too believe that they are

standing for the applicant, in a case of theft. Now that the nature of the case is different and more grave, they have not shown that they can exercise power over the applicant, to ensure he attends his trial, if released on bail. Whereas an in-law of an accused is not barred from standing surety for the accused, for other reasons given, I find Mr. Okumu not a substantial surety. I noted that, his description as business man was added by the author of the letter of introduction, as a last minute thought. The hand-writing appears questionable, as it lacks style and consistency with the rest of the preceding words. The same applies to the second surety. She did not produce the latest school Identity card, confirming she is still a teacher at the school, as the last ID was issued on 1 July 2016 and expired on 31 June, 2021. Whereas these deficiency was cured by a letter dated 20 September, 2020 wherein the school head teacher cleared Ms. Joyce Ajok to be off-duty for a day to attend court sitting of the day, it seems to court that, given that Ms. Ajok works in Nwoya District, and yet the applicant is resident in Gulu, given her expected busy schedule as a school teacher during working days, she may not well ensure and influence the applicant to attend his trial, if given bail. Importantly, the offences charged are serious, attracting a possible death sentence on conviction, thus the likelihood of the applicant absconding is not remote. He would thus need sureties of substance to ensure he does not abscond.

Court was addressed about the worth of the sureties. Although impecunious financial status is no ground for denying someone from standing as a surety, in serious offences however, such as the instant case, a surety should be substantial. A surety is a pledge by another person guaranteeing that if the accused person does not appear before the court at the specified time and date, he will pay a certain sum of money to the court. The amount of money which the accused or a person standing surety for him will be required to pay, should the accused person default, is called a security. A surety is therefore not merely there to assist a friend or a relative out of prison. A surety has a duty to court to ensure that the accused does not abscond. A surety must be at court ready to explain in the event of the accused's failure to attend. A surety can even arrest the accused if he/she has reason to believe that the accused is about to abscond. If the accused absconds, the surety will be called upon to show cause why his recognizance should not be forfeited.

See: B.J Odoki: A guide to criminal procedure in Uganda (2nd Ed.) 1990. Page 71; Francis J. Ayume, Criminal Procedure and Practice in Uganda, page 59.

In Uganda Vs. Hajji Abas Mugerwa & another (1975) HCB 216, it was held that it was the duty of each surety to make sure that the accused attended

the court on the date mentioned in the bond and continued to attend until otherwise directed by court.

In the present case, the sureties have not shown that they have any security they would be ready to forfeit to the State, if the applicant were to abscond, after being granted bail. Ms. Ajok told court that she has a family home jointly owned with her spouse. She was not able to point out to any asset of her own, to show her ability to meet the bond the court might impose. The same applies to Mr. Okumu, although presented as a business man, the nature of business was not shown to court. It was just a bare statement by the author of the questioned LC 1 letter, which I have already given no weight.

Given the seriousness of the offence, and the fact that the sureties have not shown that they would exercise power over the applicant, to ensure he attends trial, I find the sureties not substantial.

Court was addressed on the ground that the applicant will not abscond, having honoured past bail terms, in respect of the murder charge. Unfortunately, this was statement from the bar, devoid of evidence. This court is therefore unable to hold that, if released, the applicant will attend trial. Having perused the summary of the allegations against him, the

applicant fully appreciates the gravity of the allegations, and therefore is more likely than not, to abscond, if granted bail.

Court appreciates that the applicant is presumed innocent until he is proved guilty or unless he pleads guilty, and that he has a right to liberty, however, these have to be balanced against the right of the victims, complainants and the society at large. Thus refusing bail does not deal a blow to the presumption of innocence. A temporary deprivation of liberty is justifiable under the Constitution itself. Liberty is therefore a derogable right. In FHRI Vs. AG, (supra) Katureebe CJ considered the provision of Article 126 (1) of the Constitution of Uganda (which provides for how judicial powers is derived and how it should be exercised) and posed a question, thus "what are the values, norms and aspirations of the people as far as bail is concerned? Court then answered *"often, court releases a person on bail and this is followed by strong disapproval from members of society, particularly in serious offences like murder. In deed in some jurisdictions, such offences are not bailable at all."*

The Learned Chief Justice then observed that, the answers to the above question bring to the fore the fact that when exercising discretion regarding the grant of bail, courts do not act in isolation. They must of course act within the jurisdiction granted by law. Looking at the law may be one way to ascertain people's values, norms and aspirations.

The other averment which was not seriously pressed by learned Counsel for the Applicant is the alleged likelihood of success of the case in favour of the applicant. I find this line of argument misconceived because that consideration is not available in a pretrial bail, but in bail pending appeal. I leave it at that.

Having evaluated all the relevant factors, one against the other, this court has come to the conclusion that the application for bail has not been strongly made out, to warrant the applicant who is charged with a serious offence of aggravated robbery from being allowed to regain his liberty, pending trial. I therefore disallow the application and the same is dismissed. This being a criminal matter, costs are not ordinarily given, and so, I decline to award costs. At any rate, it was not prayed for, rightly and so by the learned State Attorney. Even if I had allowed the application, I would have declined the prayer for costs in the Motion, as no basis is given by the applicant.

Before I take leave of this matter, given that many cases appear to be pending trial before this court, following successful committal of accused persons, the Deputy Registrar of Court is directed to make necessary arrangements to ensure that the cases are fast tracked and fixed for the next convenient session of court. I so order.

Delivered, dated and signed this 22 September, 2022.

22/9/2022

George Okello
JUDGE HIGH COURT

Ruling read in in the presence of;

Ojara Byron for Applicant, on brief for Odyek Douglas.
The Applicant is in Court.
Ms. Nyipir Getrude for the State.
The Complainant is in Court.
The Victim is in Court. They are Ogutu Evans Ojara(victim) and the complainant is Ogutu Joseph.

Mr. Ojara: The matter is for ruling of bail application, and we are ready to receive it.

Mr. Nyipir: We are ready to receive the ruling.

Court: Ruling read in Chambers.

George Okello 22/9/2022
JUDGE HIGH COURT